

HARPSWELL BOARD OF APPEALS
Minutes of June 24, 2009

APPROVED

Attendance: Ned Simmons, Chair, John Perry, Ellen Lebauer and Jim Knight. In addition, Code Enforcement Officer William Wells was in attendance. George Every was absent.

The meeting had been duly advertised in the Brunswick *Times Record*. Mr. Simmons, Chair, called the meeting to order at 6:35 PM at the Harpswell Town Office, 263 Mountain Road, Harpswell.

The meeting began with the introduction of the Board members. The Chair then read the Agenda and explained the meeting procedure to the audience.

It was stated that the site visit was held on Monday, June 22, 2009 at the Scott property. Board members present were the Chair, Mr. Perry and Ms. Lebauer; others were also in attendance. [The Bourassa property had been previously visited.]

OLD BUSINESS

Matter of David and Dale Bourassa, Application for Reconsideration of Setback Variance under §14.1.4.4 of the Basic Land Use Ordinance, Tax Map 50 Lot 20, 37 Harpswell Islands Road, Harpswell.

The Board had denied the Bourassa's Request for Variance at their previous meeting. The Chair commented that the Board was not required to hear the request; however, it was decided that they would. The Chair then read through the materials that had been distributed to the Board.

Mr. Bourassa addressed the Board, and apologized for missing the previous meeting. He explained that he and his wife had applied for a setback variance for the house across the street from theirs, on Route 24 (Harpswell Islands Road), Great Island. He said they had applied using the single family dwelling criteria on the form given to them by Jason Marshall, the Code Enforcement Office Assistant. It was their impression that was the only criteria that applied to their situation. They understood that their request was denied because they filled out the wrong form, and their situation did not actually meet the criteria.

The Chair made the motion to grant Mr. Bourassa's request, and to grant reconsideration; he asked for discussion. Mr. Perry referred to the letter sent to Mr. Bourassa from Melissa Moretti, Recording Secretary dated May 29, 2009. The Chair stated that the matter had previously been heard under §14.1.4.4 of the Ordinance, and was denied, and said it would be heard under the Undue Hardship Variance, §14.1.4.2. He also said that, if Mr. Bourassa had attended the previous meeting, it might have been possible to allow him to change the section under which he had applied.

Ms. Lebauer seconded the motion. There was no further discussion; the Board voted three to one to grant the Bourassa's request for reconsideration, with Mr. Knight voting against.

Mr. Bourassa continued his explanation, and stated that they owned a lot across the road from their house that had a small shed on it (about 10 ft.x12 ft.). He said they would move the shed off the lot if the variance was granted. The size of the lot was 50 ft.x60 ft. (3000 sq. ft.) and the setbacks were 25 ft. on each side, which would leave "nothing to build on" ("basically a line down the middle"). They wanted to build a 24 ft.x24 ft. two car garage that would be approximately 20 ft. high if they put a 12 ft.x12 ft. roof on it. That situation would take up just under 20% of the lot size. He stated that the lot line abuts a rental house next door, and that there is a dirt road on each side. Mr. Bourassa stated there was less than three feet between the lot line and the house. There would also be 13 ft. on each side from the gravel roads. The garage would be 20 ft. back from that house; 18 ft. back from the lot line. He said that the neighbor who used the gravel road to the side of the lot for access to their house had no problem with them building a garage. He explained they needed the garage for winter storage of their vehicles as well as other household goods, which would be stored above.

It was clarified by the Chair that the property was in the shoreland zone, and that Mr. Bourassa wished to proceed under §14.1.4.2, the standard hardship variance. He stated that the matter was not eligible for a practical difficulty variance because the property was in the shoreland zone.

After some explanations, the Chair suggested to Mr. Bourassa that he could either withdraw his request, or the Board could go through the application. Mr. Bourassa decided to withdraw the request.

NEW BUSINESS

Matter of Sean P. Scott, Request for Administrative Appeal, property of Ronald S. and Kathleen J. Littlefield, Tax Map 51 Lot 149, 16 Aucocisco Lane, Harpswell.

The Chair reviewed the materials that had been distributed to the Board members, which included a memorandum from the Code Enforcement Office dated June 24, 2009.

The Code Enforcement Officer, William Wells, addressed the Board. He stated that the appeal in question was “untimely”; the Ordinance stated an appellant had 40 days, and the current matter had been eight months. He suggested that the matter should be heard in Superior Court, and not by a Board of Appeals. The Chair clarified that the building permit had been issued seven to eight months prior. Mr. Wells referred the Board to the memo they had been handed at the meeting, which was in response to Mr. Scott’s questions. He also said that he had previously revoked the septic permit on May 11, 2009 due to erroneous information from the site evaluator, and the system did not qualify as a first time system. He stated that Mr. Logan, a site evaluator with Albert Frick & Associates was in attendance, and that there was no septic, but a design was being reviewed by the Code Enforcement Office, the LPI and the State of Maine, Dept. of Health & Human Services.

The Chair asked Sean Scott to address the Board. Mr. Scott stated that he was an abutting property owner to the Littlefields, and he had requested an appeal for both the septic permit and the plumbing permit [building permit]. He said his understanding of the ordinances was that “you could not have a valid building permit if you did not have a valid septic design.” He said he was never notified as an abutting property owner of any building or plumbing permit. His primary concern was the septic design’s setback to the wellhead on his property. He had hired Harty & Harty to do an independent survey, which determined that it was eight feet too close (100 ft. from the wellhead). He also consulted with Site Evaluator Steve Robbins because Mr. Scott understood that the site had previously been rejected for a septic system by another site evaluator. After evaluation by that site evaluator and the State, it was determined that it was an invalid septic design. The State contacted the Code Enforcement Officer a few days before the septic permit was revoked. Mr. Scott clarified that his request was to have the Town revoke the building permit until a valid septic design could be submitted and approved. He stated that there were also “a number of violations” to the State and Town ordinances that he wanted to be documented. He stated that he wanted the Town to take action on the violations and resolve them before building could proceed.

The Chair stated that the appeal did not mention a building permit, only a septic permit. He asked Mr. Scott if he was satisfied that the septic issues had been addressed. Mr. Scott said that, even though the septic permit had been revoked by the Code Enforcement Officer, he was still of the opinion that the Littlefield’s should not have a valid or approved septic design given that there were other “perceived and/or validated” violations.

The Chair asked the Board if they had any questions, and Mr. Wells took the podium. He referred the Board to the copy of Mr. Scott’s appeal, which challenged the septic design only. It did not mention any other violations. The Chair asked Mr. Wells if it was possible to grant a building permit without a septic design for a residence; he said that it was. He said he had told the owners that they would not get a Certificate of Compliance without a septic design. He clarified that the Town required proof of adequate septic, dependent on the kind of building to be occupied (“lived in”).

Mr. Knight asked if a building permit, once issued, could not be revoked unless it was fraudulently obtained. Mr. Wells responded that he could revoke the building permit; however, it would probably not “stand in a court of law”. Once the Littlefields had a vested interest, their building permit would be valid.

Mr. Knight reiterated that the application addressed the septic design only, and did not think the Board should amend it. The Chair agreed, and it was also agreed that it did not prevent an additional appeal for any other purpose in the

future. Mr. Perry suggested the matter be withdrawn, since the septic design had been revoked. Mr. Wells concurred. Mr. Wells said that the building permit had been issued September 25, 2008 and the appeal was filed on May 18, 2009, nearly a full eight months. The Board had the concern of whether or not they wanted to set a precedent; Mr. Wells agreed. The Chair asked Mr. Scott if he wanted to respond.

Mr. Scott stated that he had not been told to submit another Board of Appeals request after the septic design was revoked; that his file regarding the matter had been considered “complete.” He was of the opinion that the Code Enforcement Officer took an “adversarial stance” against him. Mr. Scott said that the “burden of proof” was on him, based on his observations and concerns. He stated that he had to hire a site evaluator to consider his concerns about setbacks. He also had to consult with the DEP to confirm that they classified the lot as wetland. He also consulted with a site evaluator and the HHS to confirm that it was an invalid septic design. The Chair said that all those facts made Mr. Scott’s application, as it read, moot, since the septic design had been revoked. Mr. Scott understood that the Board wanted him to file for another appeal for the building permit.

Mr. Knight did not see that the Code Enforcement Office had taken an adversarial stance; Mr. Wells had reviewed his paperwork, saw there was an error made, and had acted on it. It was his opinion that Mr. Scott had “done a good job” and that Mr. Wells had worked with Mr. Scott. He explained that, although the Board would occasionally allow for some latitude, they did not normally allow for substantive changes in the subject of an appeal. Mr. Scott had acted within his right, consulting with the DEP, etc.

Ms. Lebauer confirmed with Mr. Scott that a new septic design was being done; she suggested that he wait to look at the new design after it is approved to evaluate whether it answered his concerns. At that point, it may prove that he would not have to go forward with the matter.

Mr. Scott asked for clarification regarding the wording of a new request. The Chair confirmed with Mr. Wells that the septic design had been revoked on May 11, 2009. Mr. Wells said that his purpose before the Board was to present the facts of the matter; he had no opinion, and was not an advocate for anyone. The Chair and Mr. Wells agreed that there was not presently a “legal theory” with which to revoke the building permit. There was some discussion regarding the 40 day limit for revocation set forth in the Ordinance.

Ed Caplain, an attorney for Kathleen Littlefield, addressed the Board. He reiterated that the matter before the Board, according to the application, was the revocation of the septic permit; revocation of the building permit was not the issue. He cited §14.2.2.1 of the Ordinance which stated that the applicant had to provide a concise, written statement of the issue and to cite the ordinances that had been violated. Mr. Caplain suggested that Mr. Scott had presented hearsay evidence regarding ordinance violations without reciting specifics. He told the Board that he “would heartily encourage” them “not to engage in hypotheticals” (with reference to the building permit).

Mr. Scott expressed uncertainty with regard to the “hearsay” Mr. Caplain referred to. He reiterated that he had presented certain documents as proof of evidence, e.g. documents from the Dept. of Health & Human Services validating an invalid septic design, the independent survey from Harty & Harty validating an “inappropriate” setback, as well as documentation on file with the Town.

Mr. Caplain stated that there was no one present to answer questions regarding the documentation presented; there was only the written information, as presented.

The Chair said that the Board would be willing to accept a registered survey as evidence, but it was the feeling of the Board that the revocation of the permit was moot.

Mr. Scott said he would reappeal, and stated he had been misinformed; that his formal disputes on record with the Town were not part of the Board of Appeals application. He stated he would reissue a revised application that would state specific Ordinance violations and his position that there should not be a valid building permit without an approved septic design. He stated that his letters on file contained specific violations (three Land Use and Shoreland Ordinance issues), which he would list in detail on the new application.

Mr. Wells addressed the Board, and stated that the report from the surveyor, Pat Harty, had measured from a small flag which appeared to delineate the septic system, which did not go in. The Board agreed that it was a moot point.

There was discussion among the Board members in which the Chair said that their ruling on the appeal could depend entirely on the issue of the 40 days.

Mr. Scott asked the Board if there was any requirement for notification to abutters regarding when permits were issued. The Chair responded that there was none, and that it was the responsibility of the property owner to “keep an eye on what was going on in his neighborhood.”

Mr. Scott also said that the fact that a permit was issued on an invalid septic design regardless of what the causes were, might change the interpretation. The Chair reminded him of the testimony of the Code Enforcement Officer who said that one was not dependent on the other.

The Chair reiterated Mr. Well’s comment that the Littlefield’s were within their right to build on the property, but took the chance of not being able to live there if they could not obtain a septic system. He told Mr. Scott that he could get legal advice and try to convince the Board, if the appeal was done in a timely manner.

Mr. Scott asked what the timeframe was for an appeal after the Board had made a decision; the Chair stated that it was 40 days. The Chair said that, if he chose, Mr. Scott could appeal to Superior Court within 45 days of the Board of Appeals decision, and that he also had 10 days after the Board of Appeals to ask for reconsideration from them.

Mr. Knight reminded Mr. Scott that each permit, while they often go together, is not dependent on the other. Mr. Wells clarified that the Code Enforcement Officer issued the building permit, and the plumbing inspector issued the plumbing permit. It was reiterated that a septic design was not required for the issuance of a building permit unless the building was going to be lived in.

The Chair stated that Mr. Scott could choose to withdraw which might limit his options for reconsideration. There was some discussion among the Board members.

Dave Kurson, an attorney who represented the builder, addressed the Board. He stated that the Board had two “very strong” reasons for denying the appeal; it was untimely and that it was “moot” because the relief sought had already been granted (the septic design had been revoked).

The Chair discussed the Board of Appeals Notice of Decision form, and stated there was a section entitled “Other Relevant Facts.” He said a relevant fact was that the appeal had been filed “way beyond the 40 day requirement,” and thought it should be approached that way. He did not think it was relevant to add the Board’s feeling that, even if the request had been timely, it had become moot because of the revocation of the septic permit. There was discussion among the Board members. Ms. Lebauer suggested to Mr. Scott that he had accomplished what he set out to do. The Chair asked for further comments from the Board.

Mr. Perry reminded the Board that the date of the appeal was May 8, 2009 and the date of the revocation was May 11, 2009. The Board agreed that was timely.

Mr. Wells referred the Board to his memo they had been distributed, and stated that he had asked Mr. Scott many times, both verbally and in writing, what code violations he thought were at issue.

Mr. Scott addressed the Board, and stated that there were observations and concerns he had addressed with Mr. Wells; he said he had a complete list. The Chair stated that Mr. Well’s comments were not relevant to their decision; neither were Mr. Scott’s.

The Chair made the motion to deny Mr. Scott’s appeal based solely on the fact that the appeal was not filed in a timely manner. Mr. Knight seconded, for the purposes of discussion. He asked the Chair about the wording of his motion, and the Board discussed the Ordinance.

Mr. Wells addressed the Board and stated that the dates Mr. Perry had referenced were incorrect. The Chair said that it was irrelevant; a discussion of the motion was on the floor. The wording of the motion was discussed among the Board members. The Chair stated that the issue of timeliness was a sufficient reason for denial, and it was not

necessary to address the issue of the septic permit in the wording of the motion. Ms. Lebauer and Mr. Perry agreed with the Chair that it was logical to mention that there had been a discussion of the septic issue, and it had “seemed to be resolved.”

Mr. Perry suggested the motion be amended to include the dates, with reference to the untimeliness, in case the matter was ever appealed. Mr. Wells informed the Board that the building permit and the septic permit were issued on the same day. He referenced his file; the date was September 23, 2008. He said that the Board of Appeals Application had been received on May 18, 2009. The septic permit in question had been revoked seven days before the Administrative Appeal Application was received.

Mr. Scott addressed the Board, and stated that his “concerns and dispute” had been expressed on April 24, 2009 verbally, and within two days, by written correspondence. He said he had not been aware of the Board of Appeals process; when he had become aware, he addressed his concerns with the Town.

He said his understanding was that, the way the appeal was written, was that he was disputing a septic design that had been revoked; as such, it was an invalid appeal. Mr. Scott said he did not understand how the timeliness of someone’s ability to dispute a building permit came into play; from what the Board had stated, they were not willing to allow him to amend.

The Chair explained that the motion under consideration was to deny Mr. Scott’s appeal for relief from the septic permit. He stated that the Board had said they would not entertain any substantial change to his appeal to include an appeal of the building permit, at this time. They were ruling strictly on the appeal of the septic permit being invalid. The motion on the floor was based, not on the merits of the issue, but on the timeliness of the filing. He explained they were also stipulating in the motion that they heard testimony that, even if it had been timely, would probably have been moot because the permit had been revoked.

Mr. Scott asked if there was timeliness involved in a septic permit. Mr. Knight explained that, if the Board looked at it as written, they looked at the date of the application for appeal relative to the issuance of the septic permit, which was received on September 23, 2008. They received the Application for Administrative Appeal on May 18, 2009. The Ordinance stated that “the appeal shall be taken within 40 days of the date of the decision appealed from...”

Mr. Perry asked Mr. Wells if a new design for a septic system (tentatively approved by Mr. Wells) was considered a new issuance date for the permit or a revision of the old one. He confirmed that it was considered “new”, and that it was also forwarded to the State of Maine for their approval. Mr. Wells said that applied to a septic permit only; the building permit would continue for five years. There was a new septic permit in process that was tentatively approved by the local plumbing inspector (Mr. Wells) who had forwarded it to the Dept. of Health & Human Services in Augusta for their approval.

The Chair summarized the previous motion by stating that he had moved the Board deny the application due to the fact that it was not filed in a timely manner. The motion carried unanimously. Mr. Perry clarified that, if the applicant came before them again with a new septic system, it would be for a new case.

Mr. Scott addressed the Board, and stated that he wanted to confirm that the Board had all the correspondence and documentation, including the DEP field determination forms and the violations report, and that they were part of the public record. It was stated by the Chair that those records were not relevant to the decision they had made. It was also determined that the documents had not been distributed to the Board members; however, they were considered part of the public record by the fact that they were in the Code Enforcement Office files.

The Chair read from the handout “Your Rights and Responsibilities after a Board of Appeals Decision,” and told Mr. Scott that the handout was available from the Town.

The Chair completed the Notice of Decision, and read it to the Board; it was then signed by the Board members.

The Chair also completed a Notice of Decision for David and Dale Bourassa. He read it to the Board, and it was then signed by the Board members.

Mr. Perry moved to approve the Minutes of May 24, 2009; the motion was seconded. The Minutes were approved unanimously, as submitted.

The meeting was adjourned at 8:45 PM.

Respectfully submitted,

Melissa Moretti
Recording Secretary